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IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 1980

DELTA AIR LINES, INC.,
Petitioner,

v.

ROSEMARY AUGUST,
Respondent.

BRIEF OF AMICUS CURIAE

This brief is filed pursuant to Supreme Court Rule 36. Consent has been obtained from both petitioner and respondent to file the brief and written confirmation of that consent has been lodged with the Court.

II.

INTEREST OF THE AMICI

The American Association of University Women, Equal Rights Advocates, the National Organization for Women Legal Defense and Education Fund, Washington Women United, and the Northwest Women's Law Center are organizations seeking to ensure that women may realize their full potential in all walks of American life. These organizations support and participate in Title VII litigation, assisting women and racial and ethnic minorities in establishing their right to be free of unlawful employment discrimination. Because this unlawful discrimination is by nature class-based and requires class-wide relief, the Title VII litigation frequently proceeds through class action under Federal Rule of Civil Procedure 23.

In the case before the Court, respondent August has made no class claims.

However, arguments made by petitioner Delta Air Lines, Inc. that Rule 68 is mandatory and applies necessarily to all Title VII actions appear to call for a decision by the Court affecting Title VII class actions as well as the instant case.

Amici submit that a decision so broad would foster conflicts of interest in the prosecution of Title VII class actions, render the class attorney unable to fairly carry out her duties to absent class members, and deprive the court of its authority to effectively supervise the settlement process. These effects are incompatible with the requirements of Rule 23.

Amici concur with respondent and with amicus Lawyer's Committee for Civil Rights Under Law to the effect that the Congressional purpose in enacting Title VII and the Congressional scheme envisioned in adoption of 42 U.S.C. § 2000e-5(h) (the

"attorneys' fees" provision) preclude application of Rule 68 in Title VII cases. However we do not propose to repeat these arguments here. Rather we intend, in filing this brief, to bring to the Court's attention the harmful effects of a strict and mandatory construction of Rule 68 in this case upon prosecution of Title VII class actions. The amici herein will urge the Court, if it is persuaded by the petitioner's arguments as applied to the instant case, expressly to reserve the issue of the applicability of Rule 68 in cases where a plaintiff class action has been sought or certified under Rule 23.

II.

SUMMARY OF ARGUMENT

The class action, allowing efficient consolidation of claims and effective design of class-wide relief, is the frequent and perhaps typical vehicle for

litigation under Title VII of the Civil Rights Act of 1964. Rule 23 of the Federal Rules of Civil Procedure governs the prosecution and settlement of class actions, by which one or more representative plaintiffs may sue on behalf of a class of similarly situated persons. This rule imposes upon each representative plaintiff and upon counsel for the plaintiff unique fiduciary duties properly to represent absent class members. It also imposes special supervisory responsibilities upon the trial court, to ensure absent class members are properly represented. A class representative may not entertain personal interests divergent from those of absent class members. The court must approve any proposed settlement, and be satisfied that class interests have not been sacrificed to divergent interests of the class representatives.

Rule 68 of the Federal Rules of Civil Procedure, at issue here, provides that under certain circumstances where a plaintiff declines to accept an offer of judgment made by a defendant, the defendant's costs must be borne by the plaintiff. Petitioner Delta Air Lines, Inc., has asked the Court to determine Rule 68 is unambiguous and mandatory in its language and must be applied literally in all actions under Title VII.

Amici submit that as to Title VII class actions, the construction and application of Rule 68 sought by petitioner makes the rule incompatible with the requirements of Rule 23, governing these actions. A class representative receiving an order of judgment from a defendant must represent the interests of the class in responding to the offer. The threat of substantial personal liability for her continued zealous prosecution in the face

of the Rule 68 offer creates a conflict of interest in her consideration of the offer. Her own interest in settlement and the class' interest in continued prosecution diverge.

This threat of liability to the class representative creates a conflict of interest for the plaintiff's attorney as well. The attorney has a duty to both the class representative and the class itself. When the interests of the representative and the class are in conflict, the attorney compromises the interest of each in conduct protective of the other.

Finally, literal and mandatory application of Rule 68 to Title VII class action requires the court clerk to enter an accepted judgment, and deprives the trial court of its necessary authority, under Rule 23(e), to supervise the class section settlement process. These conflicts between the requirements of Rules 23 and 68

in Title VII cases are avoided if the Court holds that Rule 68 is inapplicable to actions under Title VII. However if the Court is persuaded by petitioner's arguments that Rule 68 must apply in the instant case, amici submit that the Court should expressly reserve the issue of its applicability to Title VII class actions.[1]

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[1]It is perhaps unfortunate that the first case posed for appellate review in this area involves an individual rather than a class action. For a determination that Rule 68 should not apply to Title VII class actions would suggest, for reasons of policy, that the rule should not be applied to individual claims either. A holding that a plaintiff is freed of the threat inherent in rejecting a Rule 68 offer only if she is a class representative would encourage plaintiffs to assert class actions not otherwise advisable. And, if freedom from a Rule 68 threat only arises upon subsequent class certification, premature efforts at certification also would be encouraged. This would be an unfortunate instance of the "tail wagging the dog."

The Court's purpose, expressed through Rule 68, to discourage litigation of little merit, is largely satisfied in Title VII actions by the Court's holding that defendants prevailing over meritless Title VII claims may be awarded attorneys' fees as

III.

ARGUMENT

If the Court Determines Rule 68 Is Applicable In This Case, the Court Should Expressly Reserve the Issue of Its Applicability to Title VII Class Actions, as Rule 23 In Those Cases Provides Special Grounds For Holding Rule 68 Inapplicable

A. Title VII cases typically are prosecuted as class actions under Federal Rule of Civil Procedure 23, which imposes fiduciary duties upon the class representative and counsel adequately to represent the class, and a special supervisory duty upon the trial court to assure adequacy of any settlement

The class action, governed by Federal Rule of Civil Procedure 23,[2] is a typical

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(footnote continued)

part of costs under the pertinent provisions of the Act. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). On the other hand, the purpose of fair and orderly administration of class actions is only assured by adherence to the standards derived under Rule 23. In these circumstances Rule 23 practice should best not be made subservient to rules adopted after consideration of Rule 68 alone.

[2]The rule generally contemplates the prosecution of class claims through an individual named plaintiff where the common claims of class members will properly be represented by the named plaintiff and may

procedural vehicle for actions arising under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, sex or national origin. Once the rule is invoked, it imposes special responsibilities upon the court, counsel and class representatives.

Employment discrimination based upon race, sex, or national origin is by definition class discrimination, as it is

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(footnote continued)

efficiently be considered by the court. In 1966, the rule was amended to permit the use of a class action where a defendant has acted generally toward the class in a manner calling for equitable relief for the class as a whole. Rule 23(b)(2). The comments of the advisory committee on that provision, observing civil rights cases to be exemplary of its intended use, underscore the special propriety of the 23(b)(2) action for prosecution of Title VII cases. Advisory Committee's Notes to Proposed Amendments to Rule 23, 39 F.R.D. 95, 102 (1966).

directed at a large class of past, present and potential future employees subject to the impermissible classification. Gay v. Waiters' & Diary Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Oatis v. Crown Zellerbach Corporation, 398 F.2d 496 (5th Cir. 1968).

Because Title VII of the Civil Rights Act of 1964 attacks this class-based discrimination, suits under the Act frequently proceed as class actions. East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977). To achieve the Congressional purpose reflected in the Act, it is particularly appropriate that they do so. Alexander v. Aero Lodge No. 735, IAM, 565 F.2d 1364 (6th Cir. 1977); Romasanta v. United Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976); Rich v. Martin Marietta Corporation, 522 F.2d 333, 340 (10th Cir. 1975); Gay v. Waiters' & Dairy Lunchmen's

Union, supra. Cf. Advisory Committee's Notes to Proposed Amendments to Rule 23, 39 F.R.D. 95, 102 (1966), supra, n. 2. The experience of the amici confirms the observations of the courts. In order to achieve meaningful remedial relief from discrimination in the job market and workplace, the amici typically seek certification of litigation as class actions under Rule 23.

But as the Court recognized in East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977), a bare allegation of class discrimination does not satisfy the requirements of the rule. If a suit is to proceed as a class action, Rule 23 requires that the class representative can and will fairly and adequately protect the interests of the class. Rule 23(a)(4). Sosna v. Iowa, 419 U.S. 393, 403 (1975).

To assure fair and adequate representation, the rule imposes a fiduciary duty

upon the representative plaintiff to protect interests of the absent class members. She may not abandon this duty where prejudice to absent class members will result. Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978).

A class representative, to fulfill her fiduciary obligations to the class she represents, must vigorously prosecute the claims and tenaciously protect the interests of the class she represents. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); In re Fine Paper Antitrust Litigation, 82 F.R.D. 143 (E.D. Pa. 1979); Roberts v. Cameron-Brown Co., 72 F.R.D. 483 (S.D. Ga. 1976); rev'd on oth. gds., 556 F.2d 356 (5th Cir. 1977). She must possess the same interest in the litigation as the absent class members. East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

The requirement of adequate class representation also imposes a unique

duty upon counsel. Though the class is not the client, the attorney in a class action owes a duty to each class member. Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3d Cir. 1971); Vuyanich v. Republic Nat. Bank of Dallas, 82 F.R.D. 420 (N.D. Tex. 1979). Lack of congruence among interests of class representatives and class members may render even a diligent attorney unable fairly to discharge this duty. Vuyanich v. Republic Nat. Bank of Dallas, supra. Thus where a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow the plaintiff to compromise the class' interest for her own benefit, but must point out the conflicts to the court so the court may protect absent class members. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), reh. den., 581 F.2d 267, cert. den.,

439 U.S. 1115 (1979). These responsibilities apply while the attorney negotiates a settlement. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976).

Finally, the class action imposes special supervisory responsibilities on the trial court. Under Rule 23(e), the trial court must approve any settlement of class claims. Sosna v. Iowa, 419 U.S. 393, 399 n. 8 (1975). The trial court must assure that absent class members are given proper and timely notice of the proposed settlement so that substantial objections to the settlement may be heard. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 835-6 (9th Cir. 1976). Then, having heard relevant arguments the trial court in its discretion may accept or reject a proposed settlement. Reynolds v. National Football League, 584 F.2d 280 (8th Cir. 1978); Girsh v. Jepson, 521 F.2d 153 (3d

Cir. 1975); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); Stull v. Baker, 410 F. Supp. 1326 (S.D.N.Y. 1976); McCray v. Beatty, 64 F.R.D. 107 (D.N.J. 1974).

Thus in a class action, the frequent vehicle for Title VII litigation, court, counsel and the named plaintiff have unique responsibilities to absent class members. The court's responsibility is especially acute in the settlement process.

B. Literal application of the terms of Federal Rule of Civil Procedure 68 to Title VII class actions would create impermissible conflicts of interest and procedural anomalies in the prosecution of these actions, and deprive the trial courts of their authority under Rule 23 to supervise the class action settlement process, and at the same time is unnecessary to discourage frivolous or meritless litigation

Petitioner contends that Rule 68 is clear and mandatory, and must be applied ministerially to Title VII actions. As indicated above, suits under Title VII frequently proceed as class actions. East Texas Motor Freight v. Rodriguez, 431 U.S.

395 (1977). Ministerial application of Rule 68 to these class actions would create conflicts of interest and procedural anomalies in the prosecution and administration of the actions, contrary to the requirements of Rule 23.

First, application of Rule 68 creates a conflict for the representative plaintiff who must discharge her responsibilities to absent class members while the Rule 68 offer threatens her with unknown prospective personal[3] liability for doing so.

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[3]Absent or passive class members generally are not liable for the defendant's costs in the event of an adverse judgment against the class. 2 Newberg, Class Actions §247 (1977). Adoption of a rule allowing the imposition of Rule 68 costs contrary to this principal would create distinct conceptual, constitutional, and administrative problems.

First, an absent class member arguably may not properly be identified as an "adverse party" and therefore may not be assessed for costs under Rule 68. See Lamb v. United Security Life Company, 59 F.R.D. 43, 48 (S.D. Ia. 1973) (absent class members who do not appear specially

The first court to address a Rule 68 claim for costs at the close of a class action has recognized this conflict and rejected the defendant's claim. In Gay v. Waiters' Union, ___ F. Supp. ___, 22 F.E.P. Cases 1249 (N.D. Cal. 1980), notice of appeal

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(footnote continued)

by their own counsel are not parties and therefore are not liable for costs that may be assessed against the representative plaintiff.) But cf. Katz v. Carte Blanche Corporation, 53 F.R.D. 539 (W.D. Pa. 1971) (assuming without discussion the possibility of absent class members being liable for a share of assessed costs), rev'd on other grounds, 496 F.2d 747 (3d Cir. 1974). Further, the means of notifying unidentified class members often employed in class actions and the use of a ten day reply period contemplated by Rule 68 are hardly sufficient devices to afford such notice and opportunity to be heard as due process requires. Finally, if the representative plaintiff were to be held jointly and severally liable with absent class members, there would normally be little incentive for the defendant properly to pursue other class members. Gay v. Waiters' Union, ___ F. Supp. ___, ___ n.3, 22 F.E.P. Cases 1249, 1250 n. 3 (N.D. Cal. 1980), app. pend. sub nom Gay v. St. Francis Hotel, et al., C.A. Nos. 80-4279 and 80-4306 (9th Cir. 1980).

filed sub nom Gay v. St. Francis Hotel, et al., C.A. Nos. 80-4279 and 80-4306 (9th Cir. 1980), the named plaintiffs sought relief under 42 U.S.C. § 1981 from employment discrimination allegedly directed at themselves and the class they represented. The action was certified under Rule 23. An apparently good faith offer of judgment was made by the defendants and rejected by the named plaintiffs prior to trial. At trial the defendants prevailed, and thereafter moved for an award of costs. The court explained the conflict an offer of judgment governed by Rule 68 would impose on a class representative with a fiduciary duty to class members.

> An offer of judgment made to a class representative raises difficulties not present where the offeree acts only on his own behalf. . . .
>
> An offer of judgment forces an individual offeree to weigh his own exposure to liability for an offeror's subsequent costs against his own expected recovery, thereby encouraging a close evaluation of

> the merits of the claim. If the same procedure were imposed in class actions, the representative as offeree would be forced to balance his personal liability for costs against the prospects of sharing with the class in any recovery. His evaluation of the offer would therefore be tinged by self-interest and would tend to differ from that of absent class members. Where the class representative's potential liability for costs is substantial compared to his personal stake in a successful outcome, an inherent conflict of interest is created by the mandatory operation of Rule 68. . . . If operation of Rule 68 were mandatory in circumstances such as these, it would create a strong incentive on the part of the class representative to accept an offer which, had his exposure been fully shared by the entire class, he would have rejected.

___ F. Supp. ___, 22 F.E.P. Cases at 1250 (notes omitted).

The court observed that though under Rule 23(e) the court itself might exercise its authority to protect absent class members, primary responsibility to protect class members still rests with the named plaintiff. "Both the Court and the absent class members must place considerable

reliance on the knowledge, judgment and good faith of the class representative in recommending for or against a settlement offer." Yet the class representative remains subject to the impermissible conflict of interest. Id. at ___, 22 F.E.P. Cases at 1251.

The court concluded that the policies and principles underlying both Rule 23 and the civil rights statutes[4] to which they are applied require rejection of defendant's Rule 68 claim for costs.[5] The defendants have appealed the court's determination.

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[4]Consistent with the lower courts' analysis in the case before this Court, the trial court in Day found the strong Congressional policy favoring relief from employment discrimination would be defeated by threatening the diligent class representative with a penalty for carrying out his responsibility. Id. ___ F. Supp. ___, at ___, 22 F.E.P. Cases 1249, at 1251-1251.

[5]As authority for its final decision the court noted the language of Rule 1, mandating construction of the rules to secure just determination of every action.

The conflict created for the representative plaintiff is felt by plaintiff's counsel as well, with unique consequences for the diligent attorney. She will recognize a substantial liability may fall on the named plaintiff if a more substantial class recovery does not materialize. Faced with the requirements of Rule 68, the attorney, with conflicting responsibilities to the representative and the class, might recommend that the representative accept the offer, yet advise the court that a wholly inadequate settlement threatens the welfare of the class. This casts protection of the class interests into the lap of the court.

But if Rule 68 were deemed controlling the court would be powerless to protect absent class members' interests, notwithstanding its duty under Rule 23(e) to do so. For the language of Rule 68 provides that an accepted offer of judgment shall be

entered by the clerk. It is entered without judicial review. Strict interpretation and application of Rule 68 to Title VII class actions thus is incompatible with governance of those actions under Rule 23.

Recent commentators have recognized the anomalies created by application of Rule 68 in the context of the class action. See Malvern, The "Offer of Judgment" Rule in Employment Discrimination Actions: A Fundamental Incompatability, 10 Golden Gate Univ. L. Rev. 963, 983-996 (September, 1980); Note, Rule 68: A "New Tool for Litigation", 1978 Duke L.J. 889, 903-904. In the former article, the author examines in detail the conflicts created by application of Rule 68 to the Title VII class action. She concludes that the rule's "rigid procedures and mandatory terms are inconsistent with the safeguards for absent

class members mandated by Rule 23 and by due process." Malvern, supra, at 1006.

The latter commentary, Note, Rule 68: A "New" Tool for Litigation, 1978 Duke L.J. 889, touches briefly on the questions which arise if Rule 68 is applied to class actions, among other problems associated with the use of the rule. The author construes Rule 23(e) to authorize the court to order an offer of judgment rejected, notwithstanding the court's ministerial role contemplated by the language of Rule 68. The author thereupon assumes that the language of Rule 68 requires the plaintiff to pay the defendant's costs, even though it was compelled to reject the offer by the court's order. 1978 Duke L.J. at 904. The author concludes Rule 68 should be amended to permit discretion in its application. Id. at 906. Commentators, like the courts below and the court in Gay v. Waiters' Union, supra, recognize the problems

inherent in administration of Rule 68 in Title VII class actions.

Thus the application of Rule 68 to Title VII class action fosters conflicts of interest for the class representatives and plaintiff's counsel. And where Rule 68 offers are accepted by the representative plaintiff, the rule would deprive the court of its ability to properly supervise the settlement process. But even assuming these difficulties are overcome by class representatives who routinely reject Rule 68 offers so as to discharge their fiduciary duty to the class, then Rule 68 serves only to punish a few unfortunate representatives for diligent protection of the interests of the class. It is scarcely a necessary disincentive to baseless or frivolous litigation. This Court's decision in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), permitting the greater judgment for attorneys' fees against

plaintiffs bringing groundless actions serves as a substantial deterrent to these actions. Any frivolous litigant not deterred by threatened liability for attorneys' fees will hardly be moved by the lesser threat of a judgment for costs. The Court's decision in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), renders application of Rule 68 unnecessary to discourage meritless litigation.

C. Application of Rule 68 in Title VII actions has a heightened chilling effect upon exercise of Title VII rights in the context of a Title VII class action

Amici agree with the court below that rigid application of Rule 68 in Title VII cases would prevent the Title VII plaintiff from pursuing vindication of her right to be free of employment discrimination. August v. Delta Air Lines, Inc., 600 F.2d 699 (7th Cir. 1979). The Title VII plaintiff is, after all, impecunious by reason of the very discrimination at issue in the

lawsuit.[6] This is apparent in the case of the individual Title VII claim.

But application of Rule 68 to Title VII class actions would be yet more chilling to the plaintiff's rights. Because the action is typically more complex, costs incurred, especially for discovery, are typically far greater. Consequently the

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[6]The petitioner wrongly contends that "Rule 68 does not, and cannot, chill a meritorious claim; [instead it] provides a monetary incentive to the plaintiff to review the claim realistically in light of the offer." Br. of Pet. 17-18. As Congress recognized in enacting the Civil Rights Attorney's Fees Awards Act of 1976, patterned after Title II and Title VII of the Civil Rights Act of 1964, the citizen who must sue to secure her civil rights frequently has little or no money with which to hire a lawyer. Senate Report No. 94-1011 on passage of Public Law 94-559, rept. in 1976 U.S. Code Cong. and Admin. News 5908, 5910. The plaintiff who can not retain an attorney can scarcely bear a risk of an unknown future liability, here claimed to be $10,000, should her claim unexpectedly fail. The petitioner's implicit assumption that a plaintiff with a reasonable and substantial claim has risk capital sufficient to avoid intimidation cannot survive close scrutiny.

risk of liability to the representative plaintiff who rejects a Rule 68 offer would be greater. Yet the plaintiff can take little comfort from an optimistic assessment of the strength of the case. For this Court's cogent observation in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), relates the experience of even the most sophisticated Title VII counsel.

> [S]eldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation.

Id., 434 U.S. at 422. Knowing this truth the attorney for a representative plaintiff and for the class must explain to the client that though her case appears strong and the class claims substantial, she may

lose, and suffer loss beyond her ability to bear. Only a rare plaintiff could fail to be discouraged in the face of that threat.

Occasionally public interest law firms and foundations[7] such as amici underwrite the costs of class litigation. But these foundations have limited resources. They too understand the unpredictability of complex Title VII litigation. Further, these foundations can provide little direction to the progress of the lawsuit. They may underwrite the costs, but a volunteer attorney typically prosecutes the suit itself. The attorney's duties run

[7] The occasional involvement of these foundations in these actions provides additional reason to hold Rule 68 inapplicable to these cases. In In re Primus, 436 U.S. 412 (1978), the Court recognized the First Amendment interest of the sponsoring foundation in litigation intended to inform the public and redress social wrongs. Mechanistic application of Rule 68 to actions sponsored for these purposes inhibits these organizations from exercise of their constitutional rights, just as it inhibits the plaintiff from vindication of her rights under the Civil Rights Act.

directly to the named plaintiff and the class she represents. The foundations have neither the resources to oversee the litigation, nor the right to interfere with the attorney-client relationship. If Rule 68 were applicable to these cases, the foundations' potential liability would be virtually unlimited. The foundations, particularly smaller ones unable to spread risk over a large litigation program, will have to act as timidly as the impecunious plaintiff, fearful of a devastating award of costs.

IV.

CONCLUSION

As we have indicated above, amici concur with the respondent and with amicus Lawyers' Committee for Civil Rights Under Law that Rule 68 generally should not be applied in Title VII cases. However, if

the Court is persuaded that Rule 68 at least may be applied in this case, amici respectfully urge the Court to expressly reserve the issue of the rule's applicability to Title VII class actions. Amici submit that application of the rule in these class actions would be both inimical to the important civil rights of the affected class, and disruptive of the court's supervision of the actions.

Respectfully submitted,

MARY ELLEN HUDGINS
Attorney for Amici